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SENATE NATURAL RESOURCES  
COMMITTEE NO. 5  
DATE 4-10-07  
BILL NO. HB 831

Testimony on HB 831  
Rep. McNutt's bill on Groundwater  
Sen. Natural Resources Committee  
April 10, 2007

Members of the Senate Natural Resources Committee:

**HB 831 is a Common Sense Update of Basin Closure Laws**

I represent landowners and senior appropriators from the Four Corners Area. On their behalf and for the following reasons, I ask you to vote yes on HB 831 and to not amend the bill beyond Rep. Walter McNutt's requested amendments. HB 831 is good policy that will allow development of new groundwater while protecting senior appropriators and upholding the important protection of basin closure laws.

**HB 831 Will Uphold Original Intent of Basin Closure Laws:**

In the early 1990s the Legislature chose to close five basins in Montana to new appropriations. These basins are the Teton, Upper Clark Fork, Jefferson/Madison, Upper Missouri, and Bitterroot. The legislative history clearly indicates the purpose of the basin closure laws – to protect existing water rights. In fact several witnesses testified before the legislative committees in the early 1990s, that the Upper Missouri River Basin was already over appropriated, and the purpose of the legislation was to protect existing irrigation and other consumptive water use. Today the surface and groundwater in many of these closed basins is even under more pressure from new development.

**HB 831 Will Protect Senior Appropriators:**

The long honored tradition in the West is that when it comes to water rights, the "first in time is the first in right" – in other words, senior water rights can trump later water rights. HB 831 fully upholds this rule of law and also does not place the financial burden of protecting senior water rights on the prior appropriator. In my client's case, hiring hydrologists has cost tens of thousands of dollars because they were protecting their senior water rights. The House Natural Resources and the House Appropriations Committees heard bills that would have unfairly switched the financial burden on senior appropriators instead of on those seeking to develop new ground water. In contrast, HB 831 requires that the new developer pay for the cost of proving no adverse affect, which protect senior appropriators.

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### **HB 831 Will Allow Reasonable Development of New Groundwater Wells:**

HB 831 creates a level playing field while maintaining basin closure protections. Sure there is a cost to comply; however, shouldn't new developers bear some of the cost of being able to utilize the groundwater? Shouldn't they pay some of the cost of protecting existing water rights holders and neighboring landowners? Otherwise, those who are in "first in time" would have to shoulder the burden of those who seek to develop new water and are "last in time." The bill allows development of new groundwater in a reasonable, fair and balanced manner because it does not require that senior appropriators pay thousands of dollars to protect their rights.

### **HB 831 Will Close Current Loopholes to Current Basin Closure Laws:**

The Basin Closure Laws allowed exemptions, such as for domestic use, for a municipality's use and for stockwater use. These exemptions allow select preferred uses of groundwater to be developed. Currently, some sub-dividers have found clever ways to try and fit into one of the exemptions. For example, in one situation, the sub-divider created a water and sewer district and then applied for a new groundwater appropriation claiming that the use was "municipal use." Clearly, such a liberal interpretation would absolutely gut the basin closure laws. Under such a twisted interpretation, practically speaking, the only use that basin closure laws would apply to is new agricultural or irrigation development. This was not the purpose of the basin closure laws and would not be a fair or reasoned application of the law.

### **HB 831 is a Good Policy:**

Allowing new development of groundwater in closed basins under carefully prescribed criteria, such as providing a hydrogeologic assessment and a mitigation plan, when necessary, is good policy. HB 831 would allow reasonable economic growth in a closed basin, while ensuring that senior appropriators are not adversely affected. The part of the bill that provides water quality protections are not provided anywhere else in the law and are necessary to protect neighbors from groundwater contamination from developers who claim no impact because they inject sewer effluent into the ground. In some cases, developers have had augmentation plans approved by the DNRC by claiming that 95% of the water they pump is not consumed because they replace that water with sewer effluent. HB 831 provides guidance to the DNRC, which is absolutely necessary because the DNRC has been denying irrigation groundwater permits while allowing some sub-dividers to utilize loopholes to develop groundwater in closed basins that have no legal provisions to actually allow such development. Additionally, the bill would allow minimal rulemaking by the DNRC and would provide solid legislative directives to the agency in areas of policy within which the DNRC has been freelancing.

### **HB 831 Should Not be Amended, Except for Those Corrections Requested by Rep. McNutt:**

Rep. Walter McNutt has provided a long, arduous process to all interested parties in developing this bill. HB 831 is the result of careful compromise on very complicated and complex water law issues. Many important provisions have already been deleted due to heavy lobbying, such as monitoring requirements that ensured that developer's promises of no adverse impact was actually proven. Any further substantive change could possibly alienate some part of the current precarious political support for the bill. Furthermore, any such amendments could create unintended consequences due to the fact that water law is complex and there is very little time to

fully think through any major changes. The bill has been fully debated and discussed because Rep. McNutt was so careful at making sure that everyone had the opportunity to respond to bill drafts. Lastly, HB 831 should absolutely not be amended to ratify the current abuses of the basin closure laws that the DNRC has allowed.

**PLEASE VOTE FOR HB 831.**

**PLEASE DO NOT AMEND HB 831, EXCEPT FOR THOSE CLARIFYING AND HOUSEKEEPING AMENDMENTS PROVIDED BY REP. MCNUTT.**

**THANK YOU FOR THIS OPPORTUNITY TO SUPPORT HB 831 BECAUSE IT IS GOOD POLICY THAT CLARIFIES THE BASIN CLOSURE LAWS AND ALLOWS REASONABLE, CAREFUL DEVELOPMENT OF NEW GROUNDWATER IN CLOSED BASINS.**

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**Four Corners Water – History of Abusing Closed Basin Exemptions:**

A few years ago, two subdividers petitioned Gallatin County to form a water and sewer district. There were only a handful of property owners within the small proposed district. All surrounding residences and businesses were excluded, and even though they requested expanded boundaries, the Gallatin County Commission approved the smaller District. When excluded neighbors appealed the formation, the Court ruled they had no standing to challenge.

Thereafter, one of the subdividers within the District, who had also sought a seat on the Board, applied for a water permit from the Department of Natural Resources and Conservation (DNRC) for three large wells within a stone's throw of the Gallatin River totaling 300 gallons per minute. Even though senior water users objected, and the data showed it would impact the Gallatin River, the DNRC found that the three wells qualified as exempt ground water. The senior water rights holders appealed, and Judge Sherlock overturned the DNRC decision.

One of the other subdividers within the District applied for nine additional wells, seeking an additional 900 gallons per minute of pumping. This subdivider formed a private water utility and entered into a contract with the Water and Sewer District to "serve" the District (and avoid Public Service Commission regulation), with such water then returned back to the developer's subdivision. This second developer applied for the DNRC permit, claiming that they were a "municipal use" and, therefore, exempt from the Basin Closure Law.

To assist this developer, the DNRC repealed its Administrative Rule that had been in place less than one year, defining "municipal use" in its common sense definition (i.e., city or town). That rule repeal was challenged in Court and has since been overturned by Judge McCarter. Nonetheless, the DNRC granted the permit, even though depletion to senior water rights users and the river was admitted. The DNRC tried to address this depletion by approving an experimental, first in Montana, "augmentation plan," which would retire certain irrigation flood rights to a sub-surface basin. This latest permit and augmentation is now being challenged in District Court in Helena by my clients.

The abuse of the "municipal use" exemption is obvious. The City of Bozeman should be entitled to exemption from the Basin Closure Law to meet its citizen's needs. The same should apply to the city of Belgrade, or the town of Manhattan, or any other city or town in one of the five closed basins in Montana. But to determine that private companies serving unincorporated areas, for development that are not yet built, qualifies as a municipality requires an interpretation of "municipal use" so broad as to render the Basin Closure Law meaningless. As the DNRC Water Rights Bureau Chief Terri McLaughlin has stated in a sworn deposition, under such an

interpretation any developer of a multi-unit project is entitled to a municipal use exemption from the Basin Closure Law:

Q. So does that mean if somebody wants to drill a well and make an application for a municipal use and serve 10 homes that he wants to build a strip mall with an ice cream store and a gas station, he can do that? There's some commercial in there and there's some domestic in there. He can do that?

A. As of today, no; but if the current [rule] definition is repealed, he could.

(Deposition of Terri McLaughlin, p. 46).

This infinitely broad interpretation of the municipal use exemption would render the Basin Closure Law and its protections meaningless, and give private developers a green light for unlimited appropriations of water from within "closed" basins. This is simply not sound policy. Accordingly, under the DNRC's interpretation, there is no, or would ever be, a closed basin. Senior rights be damned.

There has also been an abuse of water and sewer districts by the Four Corners developers for their own private gain. In effect, a small group of private interests formed a water and sewer district to obtain public benefits (i.e., public financing, municipal exemption, etc.). Should a subdivider be able to form a water and sewer district? No. Should a subdivider be considered a town? No. But these obvious abuses have occurred in Four Corners with complicity by the DNRC. HB 831 should not be amended to ratify such abuse.

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## ***Understanding HB 831***

**Introduction:** In certain Montana river basins the new appropriation of groundwater is restricted, and applicant's have few options for developing water supplies. Proposed Bill HB 831 provides a balanced mechanism for water-right applicants to develop new supplies, under certain carefully prescribed circumstances, in closed basins. The bill would allow reasonable economic growth in a closed basin while ensuring that Montana's rivers, streams, and creeks will be maintained as a valuable natural resource. Additionally the bill:

- For the first time, addresses and ties critical water quality issues to the water that could affect senior water rights holders and other appropriators;
- Requires that wastewater effluent when used to recharge the aquifer must meet drinking water standards at the treatment facility exit;
- Puts the burden on the applicant to submit sufficient and detailed data in a hydrogeologic report to verify that there will no adverse effects on existing water rights of other people or other perfected or planned users or developments for which a permit or certificate has been issued;
- Requires the data be submitted to DNRC but also to the Montana Bureau of Mines and Geology. The bureau of mines and geology will provide DNRC a report on the accuracy of the data and assessment. This will result in the right people evaluating the data and assures a proper balance for the public interest;
- Grants \$500,000 to the Montana Bureau of Mines and Geology to do a Basin Closure Case Study, starting July 1, 2007, to develop and gather data to determine minimum standards and criteria for the hydrogeologic assessments; and,
- Honors the tradition of "first in time, first in right" and "do no harm" to senior appropriators.

**HB 831 Provides Guidance to DNRC:** Currently, there are no legislative provisions to allow mitigation and augmentation to offset groundwater use except in the Clark Fork River basin. The Department of Natural Resources and Conservation has nonetheless approved plans without guidance from the legislature. HB 831 would provide consistent rules for new project developments, guidance to DNRC regarding application review, and reduce the uncertainty for both the DNRC and applicant in reviewing and preparing information to support new projects.

**HB 831 Provides for New Water Supply Projects While Safeguarding Senior Water Rights:** HB 831 allows for certain types of water supply projects to be developed, contingent upon an applicant's ability to demonstrate that select criteria are met.

### **1. Hydrogeological Assessment - Section 15.**

A Hydrogeological Assessment is defined as a report for the project site that describes the geology, hydrogeologic environment, water balance, and water quality related to the project. HB 831 also sets standards for who is appropriately trained and experienced to prepare the report. Section 15 details what the types of information need to be included, and, while the list appears to

be complicated, these components are recognized in most other Western States as standard baseline or background information.

## **2. Mitigation Plan – Section 16.**

Once the timing and magnitude of effects on the hydrologic system are estimated, the applicant would develop a plan to offset the effects. A Mitigation Plan gives an applicant the opportunity to demonstrate that they can offset the hydrologic effects without impairing the rights of other water right holders or jeopardizing instream resources and the environment. Section 16 details what should be included in such a plan, including a statement of:

- where and how the water in the plan will be put to beneficial use;
- when and where water reallocated through exchange or substitution will be required;
- the amount of water reallocated through exchange or substitution that is required;
- how the proposed project or beneficial use for which the mitigation plan is required will be operated.

One form of mitigation could be aquifer recharge. In addition to the elements above, an aquifer recharge plan would include:

- an explanation of the water-quality for the recharge water – for instance, proof that appropriate water-quality permits have been granted;
- evidence that an application for a change in appropriation right, if necessary has been submitted; and,
- a description of the process by which water will be reintroduced to the aquifer.